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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 409.

THE MERCANTILE NATIONAL BANK OF THE CITY OF HARTFORD, APPELLANT,

vs.

WILLLARD CARPENTER, JOHN LOVE, AND DE WITT C. KELLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED APRIL 17, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 409.

THE MERCANTILE NATIONAL BANK OF THE CITY OF HARTFORD, APPELLANT,

vs.

WILLARD CARPENTER, JOHN LOVE, AND DE WITT C. KELLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas in the circuit court of the United States for the district of Indiana at Evansville, begun and holden at the United States court-rooms, in the city of Evansville, said district, on the first Monday in April, in the year of our Lord one thousand eight hundred and seventy-six, before the honorable Walter Q. Gresham, judge of the district court of the United States for said district of Indiana, and ex-officio one of the judges of said circuit court.

THE MERCANTILE NATIONAL BANK OF THE city of Hartford, Connecticut,
v.
WILLARD CARPENTER, JOHN LOVE, AND DE Witt C. Keller. } Chancery.

Be it remembered that heretofore, to wit, on the 22d day of February, A. D. 1876, there was filed in the office of the clerk of said court, at Evansville, a transcript from the Vanderburgh circuit court of the State of Indiana, a district aforesaid, in the words and figures following, to wit:

2 STATE OF INDIANA,
Vanderburgh County:

At a term of the Vanderburgh circuit court begun and held at the court-house, in the city of Evansville, county of Vanderburgh, State of Indiana, before Hon. William F. Parrett, judge of the first judicial circuit of the State of Indiana, on the first Monday in September, 1875, the following proceedings were had on the 37th judicial day of said term, to wit, October 18th, 1875:

MERCANTILE NATIONAL BANK OF HARTFORD
v.
WILLARD CARPENTER, JOHN LOVE, DE WITT C. Keller.

Now upon motion it is ordered that the defendant Carpenter answer by to-morrow morning the interrogatories filed with plaintiff's complaint as amended.

And now comes the defendant Willard Carpenter, by Shackelford & Richardson, his attorneys, and files his petition, verified by affida-
3 vit, setting forth that he is a citizen and resident of the State of Indiana, and the plaintiff is a corporation organized under and existing by the laws of the State of Connecticut; that the matter in controversy exceeds in value the sum of five hundred dollars, exclusive of costs, and praying that this cause may be removed for trial to the circuit court of the United States for the district of Indiana.

And now comes the defendant John Love, by Charles Denby, his attorney, and files his petition, verified by oath, making a like statement and a like prayer.

And said Carpenter and said Love, having also filed each for himself a bond in amount and with surety to the approval of the court, conditioned severally that they will enter in said court for the United States for the district of Indiana, on the first day of its next session, to be holden at Evansville, Indiana, a copy of the record of said suit, and pay all the costs that shall or may be awarded by said circuit court of the

United States, if said court shall hold that this suit has been wrongfully or unlawfully removed thereto; it is now therefore ordered that proceedings in this cause cease in this court, and that the same be removed to the circuit court of the United States for the district of
4 Indiana at Evansville, and stand for trial at the next session thereof to be holden at Evansville.

STATE OF INDIANA,
Vanderburgh County, sct:

I, Soren Sorrenson, clerk of the Vanderburgh circuit court, certify that the foregoing is full, true, and correct copy of the orders of said Vanderburgh circuit court for the removal of the above-entitled cause to the circuit court of the United States.

Witness my hand and the seal of said court, at Evansville, this 22d day of February, 1876.

[SEAL.] S. SORRENSON,
Clk.

And afterwards, to wit, at the April term, 1876, of the circuit court of the United States for the district of Indiana, and on Wednesday, the fifth day of April, 1876, said day being the third day of the April term, 1876, of said court, the following further proceedings were had, to wit:

Comes now the plaintiff by A. B. Robinson, its attorney, and
5 by leave of court now here files its bill in chancery in the words and figures following, to wit:

To the judges of the circuit court of the United States for the district of Indiana, at Evansville:

The Mercantile National Bank of the city of Hartford, in the State of Connecticut, a corporation existing and being conducted in said city, its officers and directors being citizens of the said State of Connecticut, brings this its bill against Willard Carpenter, of the city of Evansville, and John Love, of the city of Indianapolis, and citizens of the State of Indiana, and De Witt C. Keller, of Frederick City, and a citizen of the State of Maryland.

And thereupon your orator complains and says that on the 6th day of May, 1859, the Mercantile Bank (which at that time was a corporation in the said city of Hartford) recovered a judgment in the Vanderburgh circuit court in the State of Indiana against the said defendants, Carpenter and Love, for the sum of five thousand four hundred and seventy-five (5,475) dollars, besides the costs of suit taxed at the further sum of dollars, which was duly entered, and still remains of
6 record, in said court, in order-book K, on page No. 403, to which your orator refers, and now here files a transcript of the same as an exhibit (Exhibit No. 1) herein. Said judgment having been rendered upon a debt contracted by the said Carpenter and Love in the year 1857. That at the time said judgment was rendered the defendant Love was totally insolvent, and has so remained to the present time.

Your orator, further complaining, says that during the term of twenty years next previous to the 12th day of April, 1858, the defendant Carpenter had been and was the owner of a large quantity of real estate situated in the State of Indiana, consisting of land and building lots in the city of Evansville, all of the value of half a million of dollars, and that during five years next before the said 12th day of April the defendant Carpenter became and was deeply indebted to divers persons in

different parts of the United States in various sums of money, the whole amounting to the sum of one hundred thousand dollars, besides the judgment above described; and that on the 12th day of April, A. D. 1858, the defendant Carpenter, so being indebted and being the owner of said valuable land and real estate, for the purpose of cheating and
7 defrauding the said Mercantile Bank and his other creditors, made and executed an instrument in writing commonly called a deed of assignment, by means of which he conveyed and transferred his said property and real estate to Henry D. Allis and William H. Walker, of the city of Evansville, which was duly acknowledged and recorded in the record of deeds of Vanderburgh County, in book No. 5, on pages 634 to 645 inclusive, a copy of which is filed herewith as a part of this bill, marked Exhibit No. 2.

Your orator, further complaining, says that the defendant Carpenter continued to control and manage said property and real estate after the making said deed of assignment, using the names of the assignees the more effectually to cover his fraud; and that during the years 1858-'9 and 1860, by means of sundry pretended sales, both public and private, all of which were fraudulent, he procured and caused the said assignees to convey said property and real estate by separate deeds to the defendant De Witt C. Keller, who is the son-in-law of the said Willard Carpenter, and also to his brother, Alvin B. Carpenter, who is the brother of the said defendant Willard, and to other persons whose
8 names are not known to your orator, and that said persons held the title to the said property for many years in secret trust for the defendant Willard Carpenter, by means whereof the title of the said property and real estate became and was so fraudulently concealed from the said Mercantile Bank and from your orator and from his other creditors that the same could not be levied on by execution or otherwise made subject to the payment of said indebtedness.

Your orator, further complaining, says that the defendant Carpenter, for the purpose of cheating and defrauding the said Mercantile Bank, your orator and his other creditors, from the day of the date of said deed of assignment until the first day of January, 1873, falsely and fraudulently pretended and represented to the said Mercantile Bank, to your orator, to his creditors, and to all other persons that he was totally insolvent and wholly and entirely destitute of property, and that he had no means or effects with which to pay his debts or any part thereof. And having thus placed his property beyond the process of law by the means aforesaid, in the further prosecution of his fraudulent
9 designs and purposes, afterwards, on the 21st day of February, 1862, the defendant Carpenter appeared before one John Lowell, esq., a master in chancery in the city of Boston, in the State of Massachusetts, and did then and there falsely, wilfully and corruptly depose and swear before the said Lowell (who was then and there fully empowered and authorized by law to administer said oath to the said defendant Carpenter) that he, the said defendant, was a poor person, and was not at that time the owner or possessor of property to the value of twenty dollars, and that he had before that time in good faith assigned and transferred all his property of every kind, both real and personal, to certain persons by him then named for the benefit of his creditors, when in truth and in fact he was the owner of said property and real estate described in the said deed of assignment.

Your orator, further complaining, says that during all the time aforesaid the said DeWitt C. Keller was confederated with his father-in-law, the said defendant Carpenter, and was aiding and assisting him in cheat-

ing and defrauding his said creditors in this, that from the said 12th
10 day of April, 1858, to the first day of January, 1873, being a term of fifteen years, the said Keller fraudulently held a large quantity of said real estate of the value of three hundred thousand dollars in secret trust for the defendant Carpenter, and during all that time the said Keller falsely and fraudulently represented and held out to the world that the said Carpenter was totally insolvent and unable to pay his debts.

Your orator, further complaining, says that the defendants, by means of said frauds and fraudulent representations, caused the said Mercantile Bank, her officers and attorneys, and the other creditors of the defendant Carpenter to believe that the said Carpenter had no property or means with which to pay his debts, and that in the further prosecution of said fraudulent designs the defendant Keller, upon the pretense that he desired to buy said judgment on his own account and with his own means, on the first day of January, 1864, caused and procured the said Mercantile Bank, by her attorney, to sell and assign said judgment to him, the said Keller, for one-half the amount of the same, with interest, to wit, for the sum of three thousand five hundred and one
11 dollars and $\frac{72}{100}$, and that the same was assigned to the said Keller in writing by the attorney of the said Mercantile Bank, a copy of which is filed herewith as Exhibit No. 2.

And your orator charges that the said Keller bought the said judgment for the sole benefit of the defendant Carpenter, and with the money and means of the said Carpenter, which he secretly furnished for that purpose, and that the said Keller holds the said judgment in his name for the benefit of said Carpenter; that the same has not been paid and that the said Keller has made no attempt to collect the same since the time the same was so purchased and assigned, and that the same remains of record in full force and unsatisfied, or otherwise made void.

Your orator, further complaining, says that during all the time from the date of the said fraudulent assignment, April 12th, 1858, until the first day of January, 1873, the defendant Carpenter was the real owner of property and real estate situated in the State of Indiana and in the State of Illinois of the value of five hundred thousand dollars ($500,000.00), the title of which was secretly and fraudulently
12 held in trust for him by the said defendant Keller and his brother Alvin B. Carpenter and other persons, and that the same was so held at the time of the sale and assignment of the said judgment, and that on the day of May, 1873, the said Keller reconveyed to the said defendant Carpenter the property and real estate so secretly held by him, and on the day of May the said Alvin B. Carpenter reconveyed to the defendant Willard the said property which had been thus secretly held by him as aforesaid, and that the defendant Willard Carpenter now holds the same in his own name in fee simple, and that the same is of the value of five hundred thousand dollars.

Your orator, further complaining, says that on the 31st day of May, 1865, the said Mercantile Bank assigned and transferred all her rights, credits, moneys, and effects in due form of law to your orator, including the said judgment, and that there is due upon the same the sum of six thousand five hundred dollars, including principal, interest, and costs.

To the end therefore that the said defendants may, if they can, shew why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths and according
13 to the best and utmost of their several and respective knowledge,

remembrance, and belief, full, true, and perfect answer make to all the maters set forth in this bill, and to the several interrogatories hereinafter numbered and set forth, that is to say:

1. Whether from the day of the date of said deed of assignment, April 12th, 1858, to the first day of January, 1873, or during some part of that time, the defendant Carpenter was or was not the real owner of a large quantity of real estate the title of which was held in the name of the said Keller. If yea, give a description of the same, the value thereof, and who holds the title to the same at the present time.

2. Whether during the time above last specified the defendant Carpenter was or was not the real owner of the real estate situated in the State of Indiana, the title of which was secretly held by his brother, Alvin B. Carpenter. If yea, state the value of the same, given a description of it, and state who holds the title of the same at the present time.

3. Whether the defendants did not, during the time between the 12th day of April, 1858, and the first day of January, 1870, repeatedly
14 and continually represent to the world, and especially to the creditors of the defendant Carpenter, that he was insolvent and wholly without property or means with which to pay his debts.

4. Whether some part of the real estate described in said deed of assignment was or was not the property of the defendant Carpenter, and held by him in fee simple at the time this suit was begun. If yea, state when and by whom the same was reconveyed to him, and on what consideration; give a description of the same and the present value thereof.

5. Whether a large part of the real estate owned by the defendant Carpenter at the time this suit was begun is or is not the identical property described in the said deed of assignment; and if yea, whether the same was not bought in at a nominal price by the said Keller and the said Alvin B. Carpenter, at a sale made by the said assignees, Allis & Walker. If yea, state the value of said property bought by Keller, and also that bought by the said Alvin B. Carpenter.

6. Whether a large and valuable portion of the property owned by the defendant Carpenter at the time this suit was begun is not the
15 identical property which the said Keller purchased at sundry sheriff's sales and at divers tax sales, upon the failure of the defendant Carpenter to pay sundry executions against him, and divers taxes assessed upon said land. If yea, give a description of the same, and the value of that bought at sheriff's sales, and that bought at tax sales.

7. Whether from the 12th day of April, 1858, until the first day of January, 1864, the said defendant Carpenter was or was not the owner in fact of the undivided one-half or of some other interest of the premises on Main street, in the city of Evansville, known as the "Bull's Head" property.

8. Whether a large and valuable part of the real estate described in said deed of assignment was not reconveyed to the defendant Carpenter by the said Keller, by a deed of conveyance executed by him and his wife during the month of May, 1873. If yea, state the value of the property so reconveyed at the date of said deed, and state what was the consideration for said deed.

9. Who furnished the money which was paid to the said Mercantile Bank for the assignment of said judgment, and for whose bene-
16 fit was that assignment made? Give in detail the particulars of that transaction.

10. If you answer that the money was furnished by the said Keller, and that the same was his money, state whether the same was not afterwards refunded to him by the defendant Carpenter, or accounted for by him in adjusting the accounts between the said Keller and Carpenter.

11. Whether the defendant Carpenter did not own an undivided interest in the said "Bull's Head" property on the 21st day of February, 1862.

12. Whether the defendant Carpenter did not own certain town lots in the town of Danville, in the State of Illinois, on the day last above named.

Your orator therefore prays that the assignment of the said judgment may be set aside as fraudulent and void, and that he may have a decree against the defendant Carpenter for the amount which may be found due upon said judgment, and that your orator may have such further and other relief in the premises as the nature of his case shall require and to your honors shall seem meet.

A. L. ROBINSON,
17 ASA & J. E. IGLEHEART,
Sol'rs for Comp't.

In the United States circuit court.

THE MERCANTILE NATIONAL BANK OF HARTFORD
v.
WILLARD CARPENTER, JOHN LOVE, AND DE WITT C. KELLER.

We undertake that the said complainant shall pay to the defendants all costs that may accrue in this action to any officer or person.

A. L. ROBINSON.
ASA IGLEHEART.

And by leave of court this cause is docketed as a chancery proceeding.

Whereupon Mess. Denby & Kumler, attorneys for the defendants, file the separate demurrers of John Love, Willard Carpenter, and De Witt C. Keller, in the words and figures following, to wit, to the bill of complaint herein filed:

In the United States circuit court for the district of Indiana. April term, 1876.

18 THE MERCANTILE NATIONAL BANK OF Hartford, Conn.,
v.
WILLARD CARPENTER, JOHN LOVE, AND DE WITT C. KELLER.

The defendant John Love, by protestation not confessing or acknowledging all or any part of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth separately demur thereto; and for his separate cause of demurrer showeth that the said complainant hath

not by his said bill made *a* such a case as entitles him in a court of equity to any relief from or against this defendant touching the matters contained in said bill or any of such matters.

Wherefore and for divers good and other causes of demurrer appearing the said bill of complaint, this defendant doth demur to the said and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and he prays
19 to be hence dismissed with his reasonable costs in this behalf sustained.

DENBY & KUMLER,
Att'ys for Def't John Love.

In the circuit court of U. S. April term, 1876.

THE MERCANTILE BANK OF HARTFORD, Conn.,
v.
WILLARD CARPENTER, JOHN LOVE, ET ALS.

The defendant Willard Carpenter, by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are thereby and therein set forth and alleged, doth separately demur thereto; and for his separate cause of demurrer showeth that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against this defendant touching the matters contained in said bill or any of such matters.

Wherefore and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to the said bill and to all the matters and things therein contained, and humbly
20 prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and he prays to be hence dismissed with reasonable costs in this behalf sustained.

DENBY & KUMLER,
SHACKELFORD & RICHARDSON,
Att'ys for Willard Carpenter.

In the circuit court of the U. S. April term, 1876.

THE MERCANTILE BANK OF HARTFORD, Conn.,
v.
WILLARD CARPENTER, DE WITT C. KELLER, et als.

The defendant De Witt C. Keller, by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth separately demur thereto; and for his separate cause of demurrer showeth that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against this defendant touching the matters contained in said bill or any of such matters.

10. If you answer that the money was furnished by the said Keller, and that the same was his money, state whether the same was not afterwards refunded to him by the defendant Carpenter, or accounted for by him in adjusting the accounts between the said Keller and Carpenter.

11. Whether the defendant Carpenter did not own an undivided interest in the said "Bull's Head" property on the 21st day of February, 1862.

12. Whether the defendant Carpenter did not own certain town lots in the town of Danville, in the State of Illinois, on the day last above named.

Your orator therefore prays that the assignment of the said judgment may be set aside as fraudulent and void, and that he may have a decree against the defendant Carpenter for the amount which may be found due upon said judgment, and that your orator may have such further and other relief in the premises as the nature of his case shall require and to your honors shall seem meet.

A. L. ROBINSON,
17 ASA & J. E. IGLEHEART,
Sol'rs for Comp't.

In the United States circuit court.

THE MERCANTILE NATIONAL BANK OF HARTford
v.
WILLARD CARPENTER, JOHN LOVE, AND DE Witt C. Keller.

We undertake that the said complainant shall pay to the defendants all costs that may accrue in this action to any officer or person.

A. L. ROBINSON.
ASA IGLEHEART.

And by leave of court this cause is docketed as a chancery proceeding.

Whereupon Mess. Denby & Kumler, attorneys for the defendants, file the separate demurrers of John Love, Willard Carpenter, and De Witt C. Keller, in the words and figures following, to wit, to the bill of complaint herein filed:

In the United States circuit court for the district of Indiana. April term, 1876.

18 THE MERCANTILE NATIONAL BANK OF Hartford, Conn.,
v.
WILLARD CARPENTER, JOHN LOVE, AND DE Witt C. Keller.

The defendant John Love, by protestation not confessing or acknowledging all or any part of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth separately demur thereto; and for his separate cause of demurrer showeth that the said complainant hath

not by his said bill made *a* such a case as entitles him in a court of equity to any relief from or against this defendant touching the matters contained in said bill or any of such matters.

Wherefore and for divers good and other causes of demurrer appearing the said bill of complaint, this defendant doth demur to the said and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and he prays
19 to be hence dismissed with his reasonable costs in this behalf sustained.

DENBY & KUMLER,
Att'ys for Def't John Love.

In the circuit court of U. S. April term, 1876.

THE MERCANTILE BANK OF HARTFORD, Conn.,
v.
WILLARD CARPENTER, JOHN LOVE, ET ALS.

The defendant Willard Carpenter, by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are thereby and therein set forth and alleged, doth separately demur thereto; and for his separate cause of demurrer showeth that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against this defendant touching the matters contained in said bill or any of such matters.

Wherefore and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to the said bill and to all the matters and things therein contained, and humbly
20 prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and he prays to be hence dismissed with reasonable costs in this behalf sustained.

DENBY & KUMLER,
SHACKELFORD & RICHARDSON,
Att'ys for Willard Carpenter.

In the circuit court of the U. S. April term, 1876.

THE MERCANTILE BANK OF HARTFORD, Conn.,
v.
WILLARD CARPENTER, DE WITT C. KELLER, et als.

The defendant De Witt C. Keller, by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth separately demur thereto; and for his separate cause of demurrer showeth that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any relief from or against this defendant touching the matters contained in said bill or any of such matters.

Wherefore and for divers other good causes of demurrer appearing in said bill of complaint, this defendant doth demur to the said bill
21 and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

DENBY & KUMLER,
Att'ys for D. C. Keller.

And afterwards, to wit, on Thursday the 6th day of April, A. D. 1876, said day being the fourth day of the April term, 1876, of said circuit court of the United States for the district aforesaid, the following further proceedings in said cause were had, to wit:

Come now Willard Carpenter, John Love, and De Witt C. Keller, by their counsel, Mess. Denby & Kumler, and file each their separate demurrer, in the words and figures following, to wit, to the bill of complaint of said complainant, and thereupon saith that the said bill of complaint is not good and sufficient and does not contain any matter of equity.

Whereupon the complainant, by its solicitors, Mess. A. L. Robinson and A & J. E. Igleheart, comes also and says its bill of complaint is
22 good and sufficient in law and equity.

And the court having heard the argument of counsel and being advised in the premises, doth now here sustain said several demurrers.

Whereupon the complainant, by its solicitors, now here move' the court for leave to amend its bill; and the court takes said motion under advisement.

And afterwards, to wit, on Friday, the 7th day of April, A. D. 1876, said day being the fifth day of the April term, 1876, of said court aforesaid, the following further proceedings in said cause were had, to wit:

Comes now the complainant, by its solicitors, Mess. Igleheart and Robinson, and come also the respondents, by their solicitors, Mess. Denby & Kumler, and Shackelford & Richardson, and this cause coming on to be heard upon the motion filed by the said complainant for leave to amend its bill, to which bill a demurrer hath been sustained by the court. And the court being advised in the premises, doth now here overrule the motion of said complainant to amend its bill.

It is therefore ordered, adjudged, and decreed that the com-
23 plainant's bill of complaint be, and the same is hereby, dismissed.

It is further ordered, adjudged, and decreed by the court that the complainant pay the costs of this suit.

And the said complainant now here excepts in all things to the said ruling, finding, and decree of the court, and prays an appeal to the Supreme Court of the United States, which is granted upon its filing in due time the appeal bond, with approved security, in the penal sum of five hundred dollars conditioned according to law.

DISTRICT OF INDIANA,
At Evansville, ss:

I, John D. Howland, clerk of the circuit court of the United States for the district of Indiana, do hereby certify the above and foregoing is a

full, true, correct, and complete copy of the record and proceedings had in the above entitled cause, as fully as the same appears of record on file in my office.

24 In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office in the city of Evansville, in the district aforesaid, this third day of October, A. D. 1877.

[SEAL.] J. D. HOWLAND, *Clerk.*

UNITED STATES OF AMERICA,
District of Indiana, set:

In the circuit court of the United States for the district of Indiana.

THE MERCANTILE NATIONAL BANK OF HARTford, Connecticut,
vs.
WILLARD CARPENTER, JOHN LOVE, AND DE Witt C. Keller.

We, Wm. L. Wood, as principal, and Wm. W. Eaton, both of Hartford, in Hartford County & State of Connecticut, are held and firm' bound unto Willard Carpenter, John Love, and De Witt C. Keller, in the penal sum of five hundred dollars, the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed and dated this 22d day of September, A. D. 1877.

The condition of the foregoing obligation is such, that whereas said complainant in the above-entitled cause has taken an appeal to

25 the Supreme Court of the United States, from a decree rendered against it and in favor of said respondents in said circuit court in said cause:

Now, if said complainant shall duly prosecute said appeal with effect, and abide by, keep, and perform such orders and decrees as shall be rendered or affirmed against it in the Supreme Court of the United States, and shall pay and satisfy all costs and damages which shall be awarded against it, then this obligation shall be void; else in full force and effect.

WM. L. WOOD. [SEAL.]
WM. W. EATON. [SEAL.]

UNITED STATES OF AMERICA,
District of Connecticut, ss:

I, Edwin E. Marvin, clerk of the circuit court of the United States for the said district, do certify that the above-named obligors are known to me to be perfectly good and responsible for the amount of the above written bond.

In witness whereof I have set hereto my hand & the seal of

26 said court, at Hartford, in said district, this twenty-eight day of September, A. D. 1877.

[SEAL.] E. E. MARVIN, *Clerk.*

(Indorsed:) Circuit court of the United States, district of Indiana. The Mercantile National Bank of Hartford, Conn., v. Willard Carpenter et als. Appeal bond.

(Indorsement on cover:) No. 409. The Mercantile National Bank of the city of Hartford, appellant, vs. Willard Carpenter, John Love, and De Witt C. Keller. Indiana C. C. U. S. Filed 17th April, 1878.

REC. 409—2

In the Supreme Court of the United States.

THE MERCANTILE NATIONAL BANK OF HARTFORD, CONNECTICUT.

vs.

WILLARD CARPENTER, JOHN LOVE AND DEWITT C. KELLER.

PHILADELPHIA BAR ASSOCIATION

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

COMPLAINANT'S BRIEF.

In the Supreme Court of the United States.

THE MERCANTILE NATIONAL BANK OF HARTFORD, CONNECTICUT.

vs.

WILLARD CARPENTER, JOHN LOVE AND DEWITT C. KELLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF INDIANA.

COMPLAINANT'S BRIEF.

This suit was begun by Appellant, in the State Court, on the 14th day of April, 1875; the object of which was, to revive a judgment against the defendants, Carpenter and Love, in the Vanderburg Circuit Court; and to have an execution of *"fi fa"* issued thereon, against their property.

On the 22nd day of February, 1876, upon the application of

the defendants, it was transferred to the Circuit Court of the United States, for the district of Indiana.

The complainant in that Court, stated the facts of the case in form of a "bill in chancery," substantially as follows:

"In the year 1857, the defendants, Carpenter and Love, became indebted to the Mercantile Bank of Hartford, in the sum of $5,000.; Carpenter at that time, and for many years before, had a large estate in land, and personal property.

Love has been insolvent for the past twenty years. At what time he became so is not stated. That debt was reduced to a judgment in Vanderburg County, on the 6th day of May 1859, being for the sum of $5,475., besides costs of suit.

That Carpenter being the owner of land, and other real property, of the value of $500,000. on the 12th day of April, 1858; made an assignment of all his property, for the purpose of cheating and defrauding his creditors. That during the years 1858, 1859 and 1860; Carpenter, by pretended and fraudulent sales, by said assignees, had a part of his property conveyed to the defendant, Keller, who is his son-in-law, and other parts to his brother, Alvin B. Carpenter, and some to parties unknown to complainant; and that these persons, Keller and A. B. Carpenter, for many years, held the title to the said property, in secret trust for the defendant, Willard Carpenter; so that the same could not be levied on, or otherwise made subject to the payment of his debts.

That during all the time from the month of April, 1858 until the first day of January, 1873, being a period of fifteen years; the defendant, Willard Carpenter, continually represented to his creditors, and to all the world, that he was wholly destitute of property, and unable to pay his debts. And the more effectually to deceive and defraud his creditors; the said Willard Carpenter, being under arrest, for debt, in the City of Boston, Mass., in the month of Febuuary, 1862, went before a master in chancery, and falsely and corruptly swore, that he was not the owner of property to the value of twenty dollars; when in fact, he was the own-

er of all the property described in the deed of assignment, worth half a million of dollars.

That during all that time, the defendant, Keller, was confederate with his father-in-law, Willard Carpenter, aiding and assisting him in his fraudulent conduct. And that during all these fifteen years, he fraudulently and secretly held the title to land and real estate of the value of three hundred thousands dollars, in trust, for the defendant, Carpenter, and during all that time; he also, fraudulently represented the said Carpenter, as totally insolvent.

That by means of said fraud and fraudulent representations, the defendant caused the said Mercantile Bank, her officers and attorneys, to believe that the said Carpenter was insolvent; that in further promotion of said frauds, the defendant Keller, under the pretense and representation to the attorneys of the said bank, that he desired to buy the said judgment, on his own account and with his own means, on the first day of January, 1864, procured an assignment in writing of the same to himself, for one-half the amount then due thereon; viz.: $3,501.72, when in fact he bought it for, and with the money of defendant, Carpenter, which was secretly furnished by him for that purpose. That the judgment has not been satisfied, but remains in full force; Keller having made no effort to collect it, since said assignment was made.

That in the month of May, 1873, the defendant, Keller, reconveyed to the defendant, Carpenter, the property and real estate which he had for so many years held in secret trust, and which Carpenter now holds in his own name, and which is of the value of $500,000.

That on the 31st day of May, 1865, the Mercantile Bank assigned all her estate, including this judgment, to the complainant. That there is due upon the said judgment, the sum of six thousand five hundred dollars.

The complainant's bill, in the usual form, contains a num-

ber of interrogatories for the defendants to answer on oath.

The complainant prays to have the assignment of the judgment set aside as fraudulent; and for general relief.

In the suit brought in the State Court, in which this judgment is of record, the plaintiff not only asked to have the assignment of the judgment set aside as fraudulent; but prayed for an axecution of "*fi fa*" to be issued aganst the property of Carpenter and Love.

The defendants in this action, filed separate demurrers to the complainant's bill, which the Court sustained; and thereupon, moved the Court for leave to amend the bill. But the Court, after taking time, unconditionally refused, and dismissed the bill at complainant's cost.

The complainant has appealed from that decree, and now seeks to have it reversed, and assigns for error; First:—The sustaining of the defendant's demurrer to appellant's bill. Second.—The refusal of the court to allow appellants leave to amend his bill.

Objection taken by counsel for defendants, to appellant's bill in the argument of their demurrers were; First.—That appellant was seeking to rescind a contract; and the bill was insufficient for that purpose, for the reason that it coutained no offer to place the defendants in *statu quo*, and that the assignment of the judgment by the Bank to Keller, could not be set aside until the appellant should repay to Keller the money whic he had paid to the bank when the assignment was made.

No doubt the general rule is, that when a person seeks to rescind a contract, he must place, or offer to place the opposite party as nearly in his original position, as the circumstances will permit. But that rule of law does not affect this case. This is not an attempt to rescind a contract between these parties; but it is a bill to cancel an assignment of that judgment; the assignment having been obtained by the fraud of Keller and Carpenter; Keller making the fraudulent representations, and Carpenter furnishing the money. In other words, it was an attempt by Carpenter, through

his confederate, Keller, to cheat the bank out of one-half her debt.

If Keller had paid his own money, the rule might apply, but as Carpenter, through Keller, paid it; the purpose of this bill is to credit Carpenter with the sum paid, and enforce the judgment for the balance; first setting aside the fraudulent assignment.

If the assignment shall be set aside; the bank can then take out her execution, and levy it on Carpenter's property.

Second. That this suit was barred by the "Statute of limitation;" more than six years having elapsed since the date of the assignment.

It should be borne in mind, that these defendants, by their demurrers, admit all the facts alleged in appellant's bill. I cite the following:

"That the assignment was procured by fraud, upon the payment of one-half of what was due upon the judgment in January, 1864; that the money so paid was Carpenter's, secretly furnished by him, to Keller for that purpose, and that the balance of the judgment, remains of record in full force and unsatisfied. So there is nothing in the second objection; for by the law of Indiana, suits upon judgments of a court of record, may be brought within twenty years. (2 G. & H. p. 159, 5th. clause of section 210.)

In discussing the question of time, it may be remarked, that although the assignment was made in 1864; nothing could be collected from Carpenter until 1873, when Keller reconveyed to him, his property. So there could be no motive for a suit upon the judgment, before that time; and this suit was begun in 1875, only two years after Carpenter had again obtained possession of his property, and the cause of action was concealed under the 219th § of the Indiana Statute of limitations. (2. G. & H. Rs. p. 162)

Another point may be mentioned, that if one-half of that judgment had been paid by Carpenter, without any falsehood or

fraud; such payment would be a satisfaction "*pro tanto.*" The residue would remain a valid debt against him, for the payment of one-half of a debt does not extinguish the other half; although the creditor agrees to receive the smaller sum in full discharge of the whole demand, and gives a receipt accordingly. (Chitty, on Contracts; title, "*Payment.*") and cases cited.: Warren vs. Skinner, 20 Conn., Rep., 559. Rose vs. Hall, 26 Conn. 392. This is the law of Indiana, "Markel admr. vs. Spitler," Admr. 28th Ind., 491; Ogburn vs. Huffman, 52nd Ind., 440. See also, "Cumber vs. Ware; Smith's Leading Cases," vol., 1. p. 146; and notes, "Fritch vs. Sutton, 5 East 530; 1 Metcalf, Mass., 276, 2nd do. 283.

But it would appear unnecessary to cite further authorities upon this point; as in the case at bar, the assignment of the judgment was obtained by the basest fraud.

The second error is well assigned; by the 29th chancery rule, the complainant has a peremptory right to amend his bill. The only discretion the court has, is that which relates to cost.

But appellant only insists upon this error, in case the first shall be held unavailing; for only in such a case, can it be necessary to resort to it.

But should the court hold, as the court below did; that the case comes within the analogies of the statute of limitation, and that no sufficient excuse is shown for the delay in bringing suit, a thing we can hardly think possible; then the case should be reversed, and sent back, so that the appellant may have leave to amend the bill, and set forth abundant ~~evidence~~ excuse for the apparent delay. The equities are all with the appellant, upon both points, and we ask a reversal of the case.

A. L. Robinson,
Asa Igleheart and
Jno. E. Igleheart,
Counsel for Appellants.

In the Supreme Court of the United States.

THE MERCANTILE NATIONAL BANK OF HARTFORD

versus

WILLARD CARPENTER.
JOHN LOVE.
DEWITT C. KELLER.

Appeal from the United States Circuit Court for the District of Indiana.

PHILADELPHIA BAR ASSOCIATION

ARGUMENT FOR APPELLEES.

CHARLES DENBY,
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Solicitors for Appellees.

The Courier Print, Evansville, Ind.

In the Supreme Court of the United States

The Mercantile National Bank of Hartford,

vs:

WILLARD CARPENTER, JOHN LOVE, DEWITT C. KELLER.

Appeal from the United States Circuit Court for the District of Indiana.

ARGUMENT FOR APPELLEES.

The Mercantile National Bank of Hartford brought this suit against Willard Carpenter, John Love and Dewitt C. Keller, averring in the bill the following facts:

That on the 6th day of May, 1859, the Mercantile Bank, a corporation doing business in the City of Hartford, Connecticut, recovered a judgment against Willard Carpenter and John Love, for five thousand five hundred and seventy-five dollars, in the Vanderburgh Circuit Court, in the State of Indiana. That at that time John Love was insolvent and so remains; that before that time said Carpenter owned a large amount of real property in Indiana and elsewhere; that on the 12th day of April, 1858, said Carpenter was largely indebted, and being so indebted, he made a deed of assignment by which he conveyed his said real estate to Henry D. Allis and William H. Walker, a

copy of which deed is filed; that after the delivery of said deed, said Carpenter continued to manage said property, using the names of the assignees to cover up his fraud; and that by means of pretended sales made in 1858, 1859 and 1860, he put said property in the names of said Keller and of his brother Alvin B. Carpenter and others; and said pretended grantees held the title for said Carpenter, whereby the title was concealed from his creditors and the property could not have been levied on by execution; and said Carpenter falsely pretended he was insolvent, until the first day of January, 1873; that on the 21st day of February, 1862, said Carpenter falsely swore before one John Lowell, a Master in Chancery in Boston, that he did not own twenty dollars' worth of property, and that he had before that, assigned his property for the benefit of his creditors; that said Keller and A. B. Carpenter fraudulently held a large quantity of property in secret trust for said Willard from the 12th day of April, 1858, to the first day of January, 1873; that by these frauds, the said Carpenter induced the Appellant and other creditors to believe that said Carpenter had no property, and thereby induced the Appellant to assign said judgment to said Keller, on the first day of January, 1864, for one-half the amount of the same, with interest to-wit: Three thousand five hundred and one dollars and seventy-two cents; that the said judgment was bought with Carpenter's money, and Keller has never tried to collect the same; that from April 12th, 1858 to January 1st, 1873, Carpenter owned real estate worth $500,000, the title whereof was fraudulently held by said Keller and A. B. Carpenter, and that in May, 1873, said Keller re-conveyed said property to said Carpenter, and said A.

B. Carpenter also conveyed the property that he held, to said Willard; that said Willard now holds said real estate; that the Mercantile Bank, on the 31st day of May, 1865, assigned all her rights, credits and effects to the Appellant. Then follows a prayer for the answer of divers interrogatories, and that the assignment of the judgment be set aside as fraudulent and void, and that Appellant may have a claim against said Carpenter for the amount that may be found due, &c.

To this bill seperate demurrers were filed by each of the Appellees; there was judgment of dismissal for the Appellees and appeal to this Honorable Court.

The Mercantile Bank assigned to the Appellant all its rights and credits. It had already assigned the judgment mentioned, to Keller. By an assignment of all its assets, does the right to sue in this suit for a tort in procuring the assignment of this judgment from the Mercantile Bank to Keller pass to the Appellant? This is the first question presented by the demurrers.

When the assignment averred by the Mercantile Bank to Appellant was made of all its assets, it had no interest whatever in the judgment. If a party sells and transfers to another, a horse, does he also transfer, by the simple sale of the horse, the right to sue for damages growing out of deceit in the original sale of the horse to him? There was not much trouble before the adoption of the various codes as to whether torts were assignable. We refer the Court to the following case bearing on this question.

In *Gardner vs Adams*, 12 *Wendell*, *p* 297, facts were these:

"Covell executed a mortgage of a bureau to Hord the

22d day of May, 1830, to secure the payment of $17 and to indemnify him against loss in consequence of having become Covell's security; the mortgage to be void if Covell paid $15, on or before the 10th of August, 1830, and indemnified Hord against loss as surety. The bureau remained in Covell's possession. In July, 1830, a constable levied on the bureau and sold it at public auction, to O. H. Gardner.

Hord agreed with Covell that if he would take up the notes given to Goodrich, he would relinquish his lien on the mortgaged property as it respected the debt of $17; and on the 12th of August, 1830, Adams by the procurement of Covell, paid the note to Goodrich and took an assignment of the mortgage from Hord as security for the advancement made by him."

In March, 1831, Adams brought an action of Replevin against Gardner for the bureau. The Court say: "The defendant below Gardner was guilty of a conversion on the 5th of July, 1830, long before the assignment. Hord at that time had a right of action for the bureau, but that right of action is no more assignable than a right of action for any other tort—an action of trespass for instance, or an assault on the person. On this ground the plaintiff must fail."

The same point was made in *Commonwealth*, for *Faris, vs Fuqua*, in 3 Lutell, (Ky.) p 41, with a more direct application of the facts to this suit. Faris recovered judgment against the estate of Henderick, Harrison and Ward. Execution issued on the judgment. The sheriff seized property of Ward to satisfy the execution, but failed and neglected to sell it, whereby the debt was lost. This was an action on the sheriff's bond. The defendant answered that Faris

had assigned the judgment to Charles Gilky, and Gilky released the judgment to Ward. To this plea there was a demurrer, and the Circuit Court held the plea good. The Supreme Court overruled the decision. They say that Faris' right to pursue the judgment was extinguished by the assignment and release. That the assignment gave to the assignee an authority to use the name of the assignor in the collection of the debt, and the receipt of the money by the assignee would prevent the assignor from proceeding in the judgment. But although the plea would operate as a bar to Faris' right to pursue the original judgment, it could not prevent him from recovering for an injury done him by the sheriff, in failing to perform his duty in collecting the money before the judgment was assigned The assignment of the judgment could not operate to transfer the right to recover for such an injury; for a right to compensation for such injury, and the right to the judgment are separate and destinct rights. They are separate and destinct not only in their origin and nature, but in relation to the persons against whom they must be asserted. The right to compensation for the injury may, indeed, be said to be incidental to the right to the judgment in one sense, for it must necessarily belong to the person who was entitled to the judgment, at the time the injury was done; but it is clearly not such an incident, as it must necessarily pass by the assignment of the judgment. Rent accruing from a tenant for years, may, in like manner, be said to be incidental to the reversion; but Rent which has accrued, will not pass by a subsequent sale of the reversion. If the plea in this case had alleged that the judgment had been assigned before the injury complained of was done, it would

have presented a different aspect; but it does not in terms allege the fact to have been so, nor is the date of the assignment alleged so that the fact might be thereby inferred."

In the suit at bar, the assignment to Keller had not been attacked; was, to all appearances, valid at the time that the assets of the Mercantile Bank were transferred to the Appellant. There was no special assignment of the judgment, and there was nothing to assign, unless the Court should hold that a tort, occurring in the purchase by Keller of the judgment, was assignable. As in the Kentucky case cited, the judgment was assigned to Appellant—if assigned at all—sixteen months after the assignment to Keller.

To the same effect is the case of *McGoon, vs Ankeny*, 11th Illinois, p 558.

"This case holds that personal property in the adverse possession of another claiming it as his own, cannot be sold and transferred even by the real owner; he has but a right of action against the possessor, which is not the subject of legal transfer."

See also the following cases which are not now accessible to the writer of this brief.

Goodwin, vs Loyd, 8 *Poster* 237; *Dunklen, vs Walkens*, 5 *Ala.* 199; *Davis, vs Hernden*, 39 *Mi*; *Young, vs Ferguson*, 1 *Lett* 298.

It may be conceived without affecting this argument, that some courts have held that torts for the taking and conversion of personal property, and generally such rights of action for a tort as would survive to the personal representation, may be assigned so as to pass an interest to the assignee, which he can assert in his own name in a civil action, as he formerly might in the name of the assignor at

law. It was so held in *Patterson v. Crawford*, 12 *Ind.*, 241. But in all such cases the right of action to recover for the tort was directly and distinctly assigned. The right of action claimed by the assignee was not collateral or incidental merely to the right assigned. Here there is no pretense that the Mercantile Bank assigned, in words, any right to the appellant to sue either Keller or Carpenter for deceit; and there is no pretense that the Mercantile Bank was the owner of the judgment in May, 1865. It had assigned that judgment to Keller in January, 1864.

In *Zabriska v. Smith*, 3 *Kern*, 322, it is held that a right of action for a false and fraudulent representation of the solvency of a purchaser is not assignable. Nor would it survive to the personal representation of the party defrauded. If we should be wrong in the proposition that the assignment of a judgment does not vest in the assignee a right to sue for a tort committed by a purchaser who procured a prior assignment of the judgment; still we claim there is no proper assignment avowed in the Bill.

The language is this:

"Your orator, further complaining, says, that on the 31st day of May, 1865, the said Mercantile Bank assigned and transferred all her rights, credits, moneys and effects, in due form of law, to your orator, including the said judgment."

By statute in Indiana judgments may be assigned by the plaintiff on, or attached to, the entry of such judgment, and the assignment, when attested by the Clerk of the Court, shall vest the title to such judgment in each assignee thereof, successively: 2 *R. S.*, 1876, *p.* 351.

To pass the legal title to a judgment the assignment

must be made in the manner pointed out by the statute. There is no pretense that the statute was complied with. We concede that an assignment not on the record will pass the equitable title to a judgment, and enable the assignee to sue thereon; but we are not able to see how the Mercantile Bank could pass to appellant an equitable title in a judgment which it had already assigned to a third party. As long as that assignment stood, the title vested in Keller. There was no title in the Bank either legal or equitable; there was simply a right to sue for the fraud in procuring the assignment, or the right to rescind. It does not appear by the above quotation from the Bill that either of these rights were assigned.

The assignee of a contract cannot take advantage of any fraud practiced upon his grantor in making it: *Carroll vs. Potter, Walker Ch.* 355.

Grant, however, that the appellant stands in the shoes of the Mercantile Bank, still if this suit had been instituted by the original plaintiff in the judgment, and there were no assignment in the case, the Bill would be bad.

On the 12th day of April, 1858, Willard Carpenter, being heavily in debt, and owning a large quantity of real estate and personal property, made a trust deed by which he conveyed all his property to trustees, to be by them sold and his debts to be paid with the proceeds. This deed of assignment lies at the foundation of this suit. It is charged that it was made for the purpose of cheating and defrauding his creditors. The trustees, in pursuance of their trust, sold and conveyed the property in the deed described to Dewitt C. Keller, Alvin B. Carpenter, and others. After a lapse of eighteen years appellant, in this collateral man-

ner, attacks this deed for fraud. No specific facts are averred, but the words "fraud" and "fraudulently" are abundantly scattered through the Bill. It is elementary learning that fraud must be specifically charged. Having averred simply that the deed was made to defraud creditors, the Bill proceeds to charge that Carpenter continued to control and manage the property, and that in 1858, 1859, 1860, "by means of sundry pretended sales, both public and private, all of which were fraudulent, he procured and caused the said assignees to convey said property" to Keller, A. B. Carpenter, and other persons. The gist of the action is, that these numberless deeds made in 1858, 1859, 1860, after private and public sales, were all fraudulent. Neither Henry D. Allis or William H. Walker, the assignees, nor Alvin B. Carpenter nor "the other persons" are made parties to the Bill.

"In suits instituted for the purpose of impeaching transactions on the ground of fraud, it is essential that the nature of the case should be distinctly and accurately stated. A mere general charge of fraud, without alleging specific facts, is not sufficient to sustain the bill. It must be shown in what the fraud consists and how it has been effected. The fraud alleged must be set forth specifically in particular and in detail, so that that the person against whom it is charged may have the opportunity of knowing what he has to meet and of shaping his defence accordingly": *Kerr on Fraud, p.* 365.

It is further charged that Carpenter on one occasion, before one John Lovell, swore he was not worth twenty Dollars, and that he had assigned all his property for the benefit of his creditors. The record shows that this affida-

vit was true. The deed as between Carpenter and his assignees was undoubtedly good, and undoubtedly they were the owners of all the real estate therein described. The deed might have been attacked by creditors, but it does not appear that it or any deed made by the assignee ever was attacked. As long as the deeds stood unchallenged by any creditor the title to the real estate remained in the grantees. It is idle to say that Keller fraudulently held the title for Carpenter. Such a statement conveys no legal idea.

The Bill proceeds to charge that Keller on the 13th day of January, 1864, with Carpenter's money and for Carpenter's benefit, bought the judgment for fifty per cent. of the amount due thereon.

It does not at all matter with whose money the judgment was purchased. If Carpenter procured Keller to buy the judgments and furnished the money with which to do it, and procured it to be assigned for less than its face value, he had the legal right to do so in the absence of fraud. We contend that there is no proper allegation of fraud anywhere in the Bill. Suppose, however, that the suit could have been maintained if brought in time, still we say that a delay from the 13th day of January to the 14th day of April 1875, being nearly eleven years' is fatal in equity to the right to sue.

There is not a line in the Bill that does not show laches. It is stated that Carpenter, after the making of the deed of assignment in April 1858 "continued to control and manage said property and real estate." This fact alone is sufficient to put creditors on their guard.

The case of *Brown, vs County of Buena Vista*, 5 Otto,

p 157, (95 U. S. Rep.) is a strong case in our favor. This court says: Laches as well as positive fault, is a bar to relief and cite, *Duncan, vs Lyon*, 3 *Johns*, ch. 351, *Marine Insurance Co., vs Hodgson* 76, *Ranch*, 332, and several other cases. The Court further says, page 160, "Nothing can call forth" a Court of equity into activity but conscience, good faith and reasonable diligence. When these are wanting the Court is passive and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court. Many cases are cited by the court to this proposition. It is laid down that whether the time the negligence has subsisted is sufficient to make it effectual, is a question to be resolved by the sound discretion of the court.

In the case of *Hayward, vs the Eliot National Bank*, decided at the October term, 1877, (reported in the Chicago Legal News for June 22d, 1878, p 320,) this court broadly lays down the proposition we contend for. The transaction on which the suit was based, took place in 1863—the suit was brought in 1872. The appellant was held concluded by the lapse of time. It is held that "without reference to any statute of limitation, equity has adopted the principle that delay which will defeat a recovery, must depend upon the particular circumstances of each case." The court cites many authorities which it is not necessary for us to quote here.

In the case of *Harwood vs. Railway Company*, 17 *Wallace* 78, it is held that where a bill is filed to set aside as fraudulent judicial proceedings five years after their completion the cause of so considerable a delay should be set

out specifically. And if ignorance of the fraud is relied on to excuse the delay, it should be shown specifically when knoweldge of the fraud was first obtained. We call the attention of the court to page 81 of this opinion. The allegation of ignorance is in general terms of the fraudulent acts and arrangements.

Say the court: "They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained."

In this case the Bank had an attorney residing in Evansville, who had taken the original judgment and who assigned it.

Carpenter lived in Evansville. It appears destinctly from the Bill that possession of the real estate never changed. Carpenter always managed it. All the deeds conveying the property were matters of record. There was no concealment. There was no suit to attack any conveyance. The conscience of the Bank does not seem to have been quickened until in 1873. Keller conveyed some of the same property to Carpenter. With full knowledge of the existence of the deeds and with every fact in its possession—with Carpenter holding and controlling the property—the Bank sells the judgment for fifty per cent. of the face and interest. It was thought to be a good trade then, and the same idea prevailed with the Bank until January, 1873. Now it is sought to repudiate it, set it aside and issue execution for the one-half of the original judgment and interest. The Bank nowhere states when or how it discovered that a fraud had been produced, and it used no diligence to discover any fraud.

Under the statute of Indiana (2 R. S. 1876, p. 122),

this action was barred in six years. Actions "for relief against fraud" must be brought in six years after the cause of action has accrued.

The 219 Sect., p. 128, 2 R. S. 1876, is this: "If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action." Appellant relies upon this section to take this suit out of the statute. But appellant has not brought itself within this section under any ruling in Indiana or elsewhere.

In the case of *Wynne et al vs. Corrielson et al*, 52 Ind., p. 317, decided at the May term 1876, being one of the latest rulings on this subject, the court holds that the statute begins to run when the fraud is perpetrated and cites the above section, and holds that it is applicable to causes of action for fraud.

The court say, that: "The statute of limitations is a statute of repose, and where its operation is sought to be avoided, because the right of action was concealed by the party liable to the action the allegation and proof of the concealment should bring the case clearly within the section. The allegation that the defendants pretended and professed to the world that the transactions were bona fide transactions is too general to amount to anything. The representation that the transaction "was valid in law" can hardly be regarded as the representation of a fact such as a party had a right to rely upon."

In all this class of cases, as in *Boyd vs. Boyd*, 27 *Ind.* 429, it is held that the concealment contemplated by the statute must be something more than mere silence. In the

case at bar there is no concealment averred. The trust deed was made in April, 1858; other deeds followed from time to time, they were put on record where all the world might read them. Carpenter continued to manage the property, devoting all his time to it. Six years after the conveyance of all his property, Keller buys the judgment. If he said that Carpenter had no property, he said simply what the records of the county had shown to be true for six years. There was no concealment and there was nothing to conceal. If fraud has been perpetrated it was done in the open day and all the world knew it as well in 1859, 1860, and following years, as it can be known now. The fact that the son-in-law conveys back to his father-in-law the property which the management of the old man, aided by the wonderful appreciation of values during the war had made valuable, is neither *per se* fraudulent or remarkable. We cite other cases to the proposition that the fraud must be concealed.

The fraud must be secret or concealed as distinguished from that which is open, visible and known: *Mastin vs. Smith*, 1 *Dillon* 85; *Angell on Lien*, § 183—191. It must be a concealment of the cause of action, for if the party knows that he has a cause of action the statute will run against him even though he may be ignorant of the evidence by which it may be established: *Parham vs. McCravy*, 6 *Rich, Eq. Rep.* 140; *Hunter vs. Hunter*, 50 *Mo.* 445. So whenever he has information sufficient to reasonably create the belief that fraud has been perpetrated the statute will begin to run: *Angell on Lien* § 187; *Story* 13 *Equity*, § 1521, *a.* He must use reasonable diligence to ferret out and discover the fraud: *Martin vs.*

Smith, supra. The statute runs before the discovery of the cause of action unless defendant conceals his liability. *Pitcher vs. Flinn*, 30 *Ind.* 202; *Foot vs. Harring'on*, 41 *N. Y.* 164; 6 *W. Va.* 168. Mere ignorance of the facts constituting the cause of action is insufficient: *Smith vs. Newby*, 13 *Mo.* 159; *Badger vs. Badger*, 2 *Cliff.* 137. Mere silence is not sufficient. *State vs. Greis*, 52 *Ind.* 356. Concealment of facts which occurred prior to the time when the cause of action accrued will not prevent it running. *Stanley vs. Stanton*, 36 *Ind.* 445. The concealment must be by the defendant. Concealment by a person other than the defendant will not suspend the statute: *Wells vs. Halpin*, 59 *Mo.* 92. The burden of proof is on the party seeking to avoid the statute to show that the facts were fraudulently concealed: *Blethen vs. Livering*, 58 *Me.* 437. The law presumes that fraud will be discovered as soon as committed, and if the evidence fails to show when it was first discovered, it will be treated as known at once: *Hunter vs. Hunter*, 50 *Mo.* 445.

We confidently submit that the language of this bill does not bring it within any of these cases. There is not one word in the bill showing when the alleged fraud was discovered.

To show further the laches of which appellant and its assignor had been guilty it needs simply to be inquired, why did not the Bank at any time after 1858 and prior to 1864 demand and require at the hands of the grantees in the trust deed a proper discharge of their duties. If these grantees fraudulently sold property the remedy was plain. The creditors according to this bill stand by for years and see a vast estate misapplied without the least effort to cor-

rect the wrong. If Keller and A. B. Carpenter paid fair value for the property purchased by them no injury has been done to anyone. The proceeds of such sales should have gone to the Mercantile Bank and other creditors of Carpenter. After such purchase no one is injured by the conveyance to Carpenter of the property so bought by his son-in-law and brother. If on the other hand conveyances were made without consideration the creditors had the power to remove the trustees, to hold them personally accountable, and to secure other honest agents to carry out the purposes of the trust. If the creditors, including the Bank, do nothing, but suffer all the real estate to be conveyed and deeds openly made and recorded, can they after this lapse of time attack the good faith of such conveyances or annul solemn transactions had on the faith thereof? This court must be driven to the conclusion—as the court below was, that there is no equity in the bill—that the whole case is misconceived and the creature of groundless suspicion enjendered only by the subsequent conveyance back to Carpenter of a considerable part of the property. To suspicious minds such conduct on the part of a son-in-law and brother might look fraudulent. These grantees having bought this property in, might have kept it for their own. But they adopted the honorable cause of conveying it back to the person who had for fifteen years given his time and labor to its improvement and management. There is no fraud in such conduct. If Keller and A. B. Carpenter bought in large quantities of this property for comparatively small sums of money which they honestly paid —if Carpenter being bereft of all his possessions gave his time to the improvement, and sale, and management of the

property so held by his son-in-law and brother—if the value of the property was enhanced so that out of its proceeds the debts could be paid or compromised, and if after these debts were paid the son-in-law and brother returned what was left out of the wreck to the original owner—none of these circumstances nor all together indicate fraud. Nobody was wronged by such conduct. The law commends instead of disapproving it. The creditor who undertakes to set aside such transactions will not be permitted to say they are fraudulent because no son-in-law or brother ever did so honorably before. The creditor cannot be permitted to argue from the assumed baseness of human nature that men never do what is is right and pure, but he must set up the actual fraud he complains of, and he must show that he has been injured by it, and that he has used diligence to secure a remedy.

This record affords another striking proof of laches. It appears that in 1862 Carpenter took the poor debtor's oath before Commissioner Lowel in Boston. The result of this proceeding was that he was discharged from arrest. The whole question as to the ownership of property and as to the bona fides of his transfer of property was necessarily gone into on that occasion. The creditors were thereby notified of the existence of the deed and were put upon their guard. They cannot now be heard to attack that proceeding collaterally. They had their day in court. As to them there is an adjudication by a competent court of the honesty and good faith of the assignment. But whether this position be correct or not, having been notified in a judical prooceeding in which the issue was fraud in the making of the deed of assignment, that fraud was

claimed to exist, creditors cannot after this lapse of time attack the deed or any transaction based on it.

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